No. 88-1304

Supreme Court, U.S.
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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1988

UNION CARBIDE CORPORATION,
Petitioner,
v.
SUPERIOR COURT FOR THE STATE OF CALIFORNIA
FOR THE CITY AND COUNTY OF SAN FRANCISCO,
Respondent,

VILLMAR DENTAL LABS, INC., A CALIFORNIA CORPORATION,
NOWELL'S, INC., A CALIFORNIA CORPORATION, AND
BEAPER, INC., A CALIFORNIA CORPORATION,
Real Parties in Interest.

PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL

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QUESTIONS PRESENTED

1. In *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), and subsequent decisions, this Court held that permitting indirect purchasers to recover treble damages for antitrust violations conflicts with Congress' intent in enacting the antitrust laws. The question presented by this case is whether, where direct purchasers have previously recovered in a federal action, a state statute authorizing indirect purchasers to recover duplicative, six-fold or greater damages in state court under state law contravenes the Supremacy Clause of the United States Constitution and is thereby preempted.

2. Whether the risk of duplicative, six-fold or greater recovery as a result of California's indirect purchaser statute violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

LIST OF PARTIES AND RULE 28.1 LIST

The parties to the proceedings below are the Petitioner Union Carbide Corporation, Respondent Superior Court of the State of California for the City and County of San Francisco, and Real parties in Interest Villmar Dental Labs, Inc., Nowell's, Inc., and Beaper, Inc.[1]

The following is Petitioner Union Carbide's Rule 28.1 list of parent companies, subsidiaries (except wholly-owned subsidiaries) and affiliates:

ACM Services, Inc.
Administracion y Servicios Carmex, S.A. de C.V.
Agromore, Ltd.
Argon, S.A.
Beralt Tin and Wolfram Limited
Calida Gas B.V.
Carbide Hashim Industrial Gases Company
Carburo del Cinca S.A.
Cia. National de Calcareos e Derivados
Comelec
Companhia Nacional de Oxigenio, Lda.
Concoat Integrated Technologies Limited
Eletrometalurgica Saudade Ltda.
Empresa Brasileira de Reflorestamento e Agro-Pecuaria Ltda.
Ace Polymer Co., Ltd.
The African Manganese Company Limited
Andaluza De Gasses S.A.
Arlasa S.A.
Beralt Tin and Wolfram (Portugal) S.A.
Carbitalia S.p.A.
Carbographite Limited
Chemos Industries Pty. Limited
Clark Chemical Industry Co., Ltd.
Compania Navarra del Oxigenio, S.A.
Delvan Pty. Limited
Elektrode Maatskappy van Suid-Afrika (Eiendows) Deperk
Empresa Brasileira de Cilindros Ltda.

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[1] Air Products & Chemicals, Inc., Liquid Air Corporation of North America, Airco, Inc., and Chemetron Corporation previously were defendants in the lawsuit brought by plaintiffs in San Francisco Superior Court. All four entered into settlements with the plaintiffs and were dismissed from the lawsuit before the summary judgment motion that resulted in the present writ action was filed.

Eregli Demir ve Celik Fabrikalari T.A.S.
Ferrygas S.A.
Focus Homecare, Inc.
Greenwich Oil Corporation
Hispano Sueca de Soldadura S.A.
Hokuetsu Kasei Shoji (Trading) Co., Ltd.
Incarmex, S.A. de C.V.
Indaver, N.V.
Indugas Nederland B.V.
Joint Industries (HYCEL) 1970 Limited
KEMET Electronics Corporation
Kyowa Shokai Co., Ltd.
Nepal Battery Company Limited
Nitropet, S.A.
Osaka Hokuetsu Kasei Co., Ltd.
Oxigenio Edy, S.A.
Oxigenus S.A.
Pantox
Polysar Limited
Rivoira S.p.A.
Sankyo Plastics Co., Ltd.
Servicios DYC, S.A. de C.V.
SIAD-Societa Italiana Acetilene e Derivate S.p.A.
Tsuda Wire & Cable
Unicarb Industrial, S.A. de C.V.
Unigas S.p.A.
Union Carbide Australia Limited
Union Carbide Canada Limited
Union Carbide Lanka Limited
Union Carbide New Zealand Limited
Borstad Welding Supplies Ltd.
Union Polymers Sdn. Bhd.
United States Welding, Inc.
S.A. White Martins
Acetogen Welding Supplies (1985) Ltd.
B-C Oxygene Ltee.
Eveready de Mexico, S.A. de C.V.
The Foundation for Social Justice in South Africa, Inc.
Grupo Condumex, S.A. de C.V.
Hokuetsu Kasei (Chemical) Co., Ltd.
IGI-Italiana Gas Industriali S.p.A.
Indugas N.V.
Iwatani Industrial Gases Corporation
Kemet de Mexico, S.A. de C.V.
KEMET International, Inc.
Miami Welding Supply, Inc.
Nippon Unicar Company, Limited
Operadora Perinote, S.A. de C.V.
Oxigeno Del Norte, S.A.
Oximesa
Poly Pack
Rhee Beheer B.V.
Rivoira Sud S.p.A.
Servicios Administrativos Carmex, S.A. de C.V.
Tenngasco Gas Gathering Company
U.C. Investment Limited
Unicarb International, Inc.
Union Carbide Australia & New Zealand Limited
Union Carbide India Limited
Union Carbide Mexicana, S.A. de C.V.
Union Carbide Pakistan Limited
Union Gas Company Limited
Union Showa K.K.
Wako Jushi Co., Ltd.
S.A. White Martins Nordeste
Ampro Oxygen Ltd.
Atlantic Oxygen Ltd.
Borstad Welding Supplies Ltd.

B.C. Welding Supplies Ltd.
Borstad Welding Supplies (1985) Ltd.
Campbell Films Limited
Coastal Plastics Limited
Commercial Alcohols Limited
Ernest Gilbert Inc.
Graphic Flexible Packaging Ltd.
L. & L. Equipment Ltd.
M & M Supplies Ltd.
Medigas Atlantic Limited
Medigas Homecare Service Lakehead Ltd.
Medigas (New Brunswick) Limited
Medigas Pacific Limited
Medigas (Quebec) Limited
Medigas (Territories) Limited
Medigaz de la Capitale Inc.
Metalwelding Supply Company Limited
North Shore Oxygen (1969) Inc.
Petromont Inc.
Richelieu Welding Supplies Ltd.
Rocky Mountain Welding Supplies (1985) Ltd.
Shawinigan Pipeline Reg'd
Tri-Valley Welding Products Inc.
Welders Supply Company
Wetmore Welding Supplies Limited
Brouillette Gas & Welding Supply Co. Ltd.
Buckwold Welding Supplies Ltd.
Canadian Welding Gases Limited
Commercial Alcohols Reg'd
Consumers Welders Supplies Inc.
Island Welding Supplies Ltd.
Les Industries Wedco Ltee.
Medigas (Alberta) Limited
Medigas Eastern Ontario Limited
Medigas Limited
Medigas (Newfoundland) Limited
Medigas (P.E.I.) Ltd.
Medigas (Saskatchewan) Limited
Merlund Plastics
Morgan Industries Inc.
Niagara Welders Supply Limited
Quinte Medical Supplies Ltd.
Rioux Oxygen Inc.
Saguenay Oxygene (1968) Ltee.
Supreme Welding Supplies Limited
Vandry Gas & Welding Products Ltd.
Commercial Alcohols Reg'd

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Petitioner Union Carbide Corporation ("Carbide") respectfully prays that a Writ of Certiorari issue to review the judgment of the California Court of Appeal denying Carbide's Petition for Writ of Mandate and/or Prohibition, entered in this action on September 30, 1988.

OPINIONS BELOW

The pertinent orders of the California Supreme Court (November 8, 1988), the California Court of Appeal (September 30, 1988), and the California Superior Court (April 4, 1988) in this matter have not been reported, and are reprinted as Appendices A, B, and C, respectively. An earlier opinion of the California Supreme Court in a previous writ proceeding is reported at *Union Carbide Corp. v. Superior Court,* 36 Cal. 3d 15, 201 Cal. Rptr. 580 (1984).

JURISDICTIONAL STATEMENT

The California Court of Appeal entered Judgment on September 30, 1988, denying Carbide's Petition for Writ of Mandate and/or Prohibition. *See* Appendix B. The instant Petition is filed within ninety days of the entry of the California Supreme Court's November 8, 1988, Order Denying Review After Judgment by the Court of Appeal. *See* Appendix A.

Carbide invokes the jurisdiction of this Court under 28 U.S.C. section 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause of the United States Constitution, art. VI, cl. 2, provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Section 1 of the Fourteenth Amendment to the Constitution of the United States provides in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides in pertinent part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal.

Section 4 of the Clayton Act, 15 U.S.C. § 15(a), provides in pertinent part:

> [A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the

> district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

The relevant portion of California's Cartwright Act, California Business & Professions Code § 16750(a), provided prior to its amendment in 1978:

> Any person who is injured in his business or property by reason of anything forbidden or declared unlawful by this chapter, may sue therefor in any court having jurisdiction in the county where the defendant resides or is found, or any agent resides or is found, or where service may be obtained, without respect to the amount in controversy, and to recover three times the damages sustained by him, and shall be awarded a reasonable attorneys' fee together with the costs of the suit.

The 1978 amendment added the words:

> Such action may be brought by any person who is injured in his business or property by reason of anything forbidden or declared unlawful by this chapter, regardless of whether such injured person dealt directly or indirectly with the defendant.

STATEMENT UNDER SUPREME COURT RULE 28.4(c)

It is noted that 28 U.S.C. section 2403(b) may be applicable because the State of California is not a party to this action and

the constitutionality of California Business & Professions Code section 16750(a) (as amended in 1978) is drawn into question.

STATEMENT OF THE CASE

The issues raised by this Petition are signally appropriate for review by this Court at this time. The California court of last resort has decided a federal question – whether California's indirect purchaser antitrust statute is preempted by the federal antitrust laws under the United States Constitution – in a way that cannot be reconciled with the decision of this Court in *Illinois Brick Co. v. Illinois* ("Illinois Brick"), 431 U.S. 720 (1977).[2] Moreover, the rulings of the California courts directly conflict with the decision of the United States Court of Appeals for the Ninth Circuit in *In re Cement and Concrete Antitrust Litigation ("Cement")*, 817 F.2d 1435 (9th Cir. 1987), *probable jurisdiction noted sub nom. State of California v. ARC America Corp. ("ARC America")*, No. 87-1862, 109 S. Ct. 51 (1988).[3] Indeed, this Court already has set oral argument in the *ARC America* case for February 27, 1989.

A. Jurisdiction of this Court

The Court has jurisdiction of this action under 28 U.S.C. section 1257(a), since the validity of the California indirect purchaser statute is drawn into question as being repugnant to the Constitution and laws of the United States.

The genesis of the present writ proceedings lies in the trial court's denial of Carbide's dispositive motion for summary judgment. In that motion, Carbide argued that the trial court was

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2 *See* Rules of the Supreme Court, Rule 17(1)(c).

3 *See* Rules of the Supreme Court, Rule 17(1)(b).

without jurisdiction to entertain the indirect purchasers' state law action, because the state statute on which the action was predicated was preempted by federal antitrust law under the Supremacy Clause of the United States Constitution, and in addition violated the Due Process Clause of the Fourteenth Amendment to the United States Constitution. The trial court denied Carbide's motion as a matter of law, deferring to an earlier decision of the California Court of Appeal, *Crown Oil Corp. v. Superior Court,* 177 Cal. App. 3d 604, 223 Cal. Rptr. 164 *("Crown Oil"), appeal dismissed,* 479 U.S. 879 (1986).

In an original writ proceeding, Carbide asked the California Court of Appeal to direct the trial court, through a Writ of Mandamus and/or Prohibition, to reverse its denial of Carbide's dispositive motion for summary judgment. The preemption and due process issues presented by Carbide in the trial court and in the writ proceeding were solely of federal law.

The denial of the writ by the California Court of Appeal, and the California Supreme Court's subsequent denial of review, constitute a final judgment for purposes of 28 U.S.C. section 1257. *See, e.g., Bandini Petroleum Co. v. Superior Court,* 284 U.S. 8, 14 (1931); *Rescue Army v. Municipal Court,* 331 U.S. 549, 565 (1947). *Accord, Fisher v. District Court,* 424 U.S. 382, 385 & n.7 (1976); *Madruga v. Superior Court,* 346 U.S. 556, 557 & n.1 (1954). *See also World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286, 289-91 (1980); *Board of Education v. Superior Court,* 448 U.S. 1343, 1346 (1980) (Rehnquist, J., in chambers); *Pacific Coast Dairy v. Department of Agriculture,* 318 U.S. 285, 293 (1943). Where a writ of prohibition or mandamus is sought on the ground that the trial court is without jurisdiction because the statute on which the lawsuit is predicated is invalid as repugnant to the United States Constitution, that writ proceeding is a distinct proceeding, the final resolution of which is reviewable by this Court as a

final judgment. *See, e.g., Rescue Army v. Municipal Court, supra,* 331 U.S. at 565-66; *Board of Education v. Superior Court, supra,* 448 U.S. at 1346.

Moreover, even were the writ proceeding not a separate, original action for jurisdictional purposes, review by the Court would be appropriate under *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469, 480 (1975). In *Cox,* the Court recognized a category of cases where, although further proceedings remained to take place in the state court, immediate review was appropriate to prevent a serious erosion of federal policy. *Cox* set forth the following criteria:

(a) The party seeking review might prevail on the merits on non-federal grounds, thus rendering unnecessary review of the federal issue by this Court.

(b) Reversal of the state court decision would be preclusive of any further litigation.

(c) A refusal immediately to review the state court decision might seriously erode federal policy.

420 U.S. at 482-83.

All of these criteria are satisfied here. If Carbide defeated plaintiffs' claims on the merits, the federal question would be mooted and review by this Court of the federal question avoided. Reversal of the state court decision – a holding that the indirect purchaser statute was preempted or violative of the Due Process Clause – would end plaintiffs' action. The federal policies articulated in *Illinois Brick,* and particularly that condemning the subjection of a defendant to a continuing risk of multiple liability, are eroded every day that this action, and others like it, continue to be prosecuted and to subject defendants to precisely that risk. The California legislature's explicit defiance of

congressional policy as articulated by this Court – its stated intent, as discussed below, to in effect overrule *Illinois Brick* – surely presents issues of federalism of more than garden variety import. Similarly, the number and scope of briefs filed with this Court in *ARC America* illustrate the importance of these issues.

B. Reasons for Granting the Writ

Review of the present case is particularly appropriate because it places before this Court the complete parameters of the preemption issue raised in the narrower and more ambiguous factual context of *ARC America*. In *ARC America*, both direct purchaser (federal law) and indirect purchaser (state law) claims were brought in a multi-district antitrust action pending before the United States District Court for the Central District of California. The district court concluded that the indirect purchasers could not participate in the settlement fund because their claims were preempted. The Ninth Circuit affirmed and, as noted, this Court has set the matter for hearing on February 27, 1989. Thus, the issue in *ARC America* is whether indirect purchasers may participate in a settlement where the claims of both direct and indirect purchasers are raised in a single proceeding.

The instant case presents the preemption question far more clearly: whether indirect purchasers can prosecute a state court action even though the direct purchasers already have recovered in a prior action, and where *no* court has jurisdiction to reconcile the conflicting claims of direct and indirect purchasers. Here, only the direct purchasers were parties to the federal action, which was brought on behalf of a nationwide class of all direct purchasers of industrial gas, and which was settled as to Carbide in February 1987.[4] The settlement fund now has been dispersed

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[4] The other defendants to the federal action had previously entered into settlements and been dismissed from the action.

and the action dismissed. The state court action is brought solely by indirect purchasers who were not parties to the federal action. Carbide previously sought to compel joinder of the direct purchasers as indispensable parties to the state action, but the California Supreme Court rejected this attempt on the ground that it was contrary to the California legislature's intent to facilitate indirect purchaser actions. *Union Carbide Corp. v. Superior Court,* 36 Cal. 3d 15, 201 Cal. Rptr. 580 (1984).

Accordingly, this case presents the preemption issue in its starkest form: where there is no court with jurisdiction of the conflicting claims of both the direct and indirect purchasers. As a result, no procedural mechanism exists to avoid the risk of multiple liability, a risk that this Court in *Illinois Brick* held to violate federal policy. Indeed, unlike *ARC America,* multiple recovery is *certain* here if the indirect purchaser plaintiffs recover at all, either by settlement or judgment. The federal direct purchaser action was settled for what the parties believed was the full value of the direct purchaser claims.[5] Since, unlike the situation in *ARC America,* the state court has jurisdiction neither of the federal settlement fund nor of the direct purchasers, any recovery by the indirect purchasers *necessarily* will be in addition to that already paid by Carbide to the direct purchasers.

A number of the briefs filed in this Court in *ARC America* urging reversal of the Ninth Circuit's decision suggest that the federal courts can solve the preemption problem simply by declining to exercise pendent jurisdiction of the state-law indirect purchaser claims. The present case offers a precise object lesson as to the result of that approach: a situation where duplicative liability is inevitable, and neither the federal court considering the direct purchasers' claims nor the state court considering the

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5 Discounted, to be sure, for the avoided risks and costs of litigation.

indirect purchasers' claims has available to it any mechanism to avoid that result.

Finally, this case, save for a single difference, presents the preemption issue on facts identical to those in *Illinois Brick*. As in *Illinois Brick*, the direct purchaser action was resolved first; a separate, indirect purchaser action was then filed in which any recovery necessarily would be duplicative of the prior recovery by direct purchasers. As did the defendants in *Illinois Brick*, Carbide sought summary judgment that the indirect purchaser claims were barred. The sole difference is that here, the indirect purchaser action is a state law action brought in state court. This case therefore tests most clearly the proper application of the congressional policies articulated in *Illinois Brick* when indirect purchaser claims are raised under state law.

The present case raises the preemption issue that this Court already has determined to hear in *ARC America*, but raises it in circumstances that add a vital, additional perspective to the Court's review of the issue. Accordingly, Petitioner respectfully requests that this Court grant a Writ of Certiorari to review the decision of the California Court of Appeal in the present case. In addition, Petitioner respectfully requests that its Petition be considered in conjunction with the *ARC America* case.

C. Factual Background

The facts summarized here were undisputed in the courts below.[6] As noted above, Carbide was first sued in a nationwide, federal class action brought on behalf of all direct purchasers of industrial gas. The federal action, which alleged that the defendants had conspired to fix the price of industrial gas,

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[6] All Exhibit references are to the record before the California Court of Appeal.

has been settled as to all defendants. Carbide was the final defendant to settle, paying approximately $33 million in cash and other consideration.[7]

The state indirect purchaser action was in effect a "piggy-back" action that resulted from the federal action. Thus, the complaints in the two actions are virtually identical; they allege the same conduct and seek identical relief. The federal and state complaints contain word-for-word the same allegations of a combination and conspiracy "the substantial terms of which were to fix, raise, maintain and stabilize the prices of industrial gas."[8] They contain identical allegations concerning the acts of the defendants in furtherance of the alleged conspiracy and the effects of the conspiracy.[9] The class certified by the federal court and that alleged by plaintiffs here involve identical products and nearly identical time periods; indeed, the class allegations in the present action are drawn almost verbatim from the federal complaint.[10] Finally, and most crucially, the damage allegations of the two complaints are identical; the state plaintiffs seek to recover the same damages already recovered by the federal plaintiffs in the federal settlement.[11]

Because the products and time periods covered by the two actions are identical, any "overcharge" paid by an indirect

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[7] Statement of Undisputed Fact No. 11 (Exhibit 4); Exhibit 5E.

[8] Statements of Undisputed Fact Nos. 5-6 (Exhibit 4); Exhibit 5C, ¶ 14; Exhibit 5D, ¶ 32.

[9] Statements of Undisputed Fact Nos. 7-8 (Exhibit 4); Exhibit 5C, ¶¶ 17, 18; Exhibit 5D, ¶¶ 33, 34.

[10] Statements of Undisputed Fact Nos. 2-3 (Exhibit 4); Exhibit 5A; Exhibit 5B at 3.

[11] Statements of Undisputed Fact Nos. 9-10 (Exhibit 4); Exhibit 5C, ¶ 18; Exhibit 5D, ¶ 35.

purchaser here was first paid by one of the direct purchasers in the federal action.[12] In short, *as the plaintiffs admitted in the courts below,* plaintiffs here "seek to recover the same alleged overcharges which were the subject of the federal action, and which are the subject of the settlement in the federal action."[13] Accordingly, any recovery by indirect purchasers in the present action – whether by settlement or by judgment – necessarily will constitute a duplicative recovery.

Early in the state litigation, Carbide sought to have the state courts come to grips with the issue of multiple and conflicting liability by requiring joinder of the direct purchasers. The California Supreme Court, however, held that requiring joinder would be contrary to the intent of the California legislature to facilitate indirect purchaser actions to the maximum extent possible. The court thus held that state law did not require an indirect purchaser plaintiff to join direct purchasers as defendants in order to prevent duplicative recoveries. *Union Carbide Corp. v. Superior Court, supra,* 36 Cal. 3d at 21-24, 201 Cal. Rptr. at 583-86.

Carbide then moved the California trial court for summary judgment on the grounds that the indirect purchaser provision of the California Cartwright Act was preempted, and that Carbide's due process rights were violated by the risk of duplicative recovery. The trial court relied on the contrary California precedent of *Crown Oil* and denied the motion. *See* Appendix C. Carbide then sought a Writ of Mandamus and/or Prohibition from the California Court of Appeal. The writ was denied, *see* Appendix B, and the California Supreme Court denied review. *See* Appendix A. If this Court does not now

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[12] The federal settlement and the district court's order approving the settlement appear in the record as Exhibit 5F.

[13] Statement of Undisputed Fact No. 12 (Exhibit 4).

grant review, Carbide faces the certain risk of duplicative recoveries in the California litigation.

ARGUMENT

I. A WRIT OF CERTIORARI SHOULD ISSUE BECAUSE THE RESPONDENTS' INDIRECT PURCHASER ACTION IS PREEMPTED BY FEDERAL LAW

This Court has interpreted the Supremacy Clause of the United States Constitution, art. VI, cl. 2, to preempt any state law that "'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Pacific Gas & Electric Co. v. Energy Resources Commission*, 461 U.S. 190, 204 (1983) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). In such cases the issue of preemption turns on the extent to which a particular state policy conflicts with the *objectives* that underlie a federal policy. *Id.*; *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 158 (1978); *Hines v. Davidowitz, supra*, 312 U.S. at 67.[14] California's indirect purchaser statute directly conflicts with well-defined congressional antitrust objectives articulated by this Court.

A. This Court Has Clearly Articulated the Federal Policy Proscribing Indirect Purchaser Actions

The genesis of the present preemption issue lies in this Court's decision in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968). There, the Court held

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[14] *See also Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947), in which the Supreme Court stated that preemption is mandated when a "state policy . . . produce[s] a result inconsistent with the objective of the federal statute." *Accord De Canas v. Bica*, 424 U.S. 351, 356 (1976); *Perez v. Campbell*, 402 U.S. 637, 652 (1971).

that an antitrust defendant is not permitted to assert as a defense that the plaintiff direct purchaser was not in fact injured because the plaintiff "passed on" all overcharges to those further down the chain of distribution. The Court stated that it was unwilling to complicate treble damages actions through attempts to trace the effects of an overcharge on the purchasers' prices, sales, costs, and profits, all the way down the chain of distribution. *Id.* at 492-94. Unresolved by *Hanover Shoe,* however, was the issue of whether indirect purchasers could maintain a cause of action under the federal antitrust laws by proving that the direct or intermediate purchasers *had* passed on to them the alleged overcharges.

That question was answered in *Illinois Brick, supra,* 431 U.S. 720. In *Illinois Brick,* as here, the defendants had already settled with the direct purchasers. 431 U.S. at 727 n.5, 731 n.11. As here, the defendants sought summary judgment that the claims of the indirect purchasers to recover treble damages for the same overcharges previously recovered in the settlement by the direct purchasers were barred. *Id.* at 727. As is discussed more fully below, this Court held that the claims of the indirect purchasers were barred. The Court concluded that applying inconsistent rules regarding the admissibility of pass-on proof to direct and indirect purchaser claims would: (1) create an impermissible risk of duplicative recoveries, (2) unduly complicate antitrust enforcement and (3) reduce the incentives of direct purchasers to sue.

The state indirect purchaser claims in the instant case are precisely analogous to the federal indirect purchaser claims that were before this Court in *Illinois Brick.* As in *Illinois Brick,* the issue whether indirect purchasers may sue is raised by a motion for summary judgment in a second, indirect purchaser action following settlement of a previous, direct purchaser action. As demonstrated below, the sole difference between the facts in this case and in *Illinois Brick* – that here, the indirect purchaser

claims are brought in state court – in no way obviates the three concerns that led the *Illinois Brick* Court to conclude that permitting the indirect purchaser action to proceed contravenes congressional policy. Accordingly, the California indirect purchaser statute is preempted.

B. California's 1978 Cartwright Act Amendment Was Designed to Circumvent Federal Law and Frustrate Federal Policy, and the California Courts Have Furthered That Intent

The California legislature responded to *Illinois Brick* by amending section 16750(a) of the Cartwright Act in 1978 to provide that a Cartwright Act action is available to

> any person who is injured in his business or property by reason of anything forbidden or declared unlawful by this chapter, regardless of whether such injured person dealt directly or indirectly with the defendant.

Id. There is no doubt that the 1978 amendment was expressly designed to negate federal law by granting rights to California plaintiffs that had been eliminated by federal law. According to the California Senate Committee on the Judiciary,

> The purpose of the bill is to prevent a federal case interpretation of the Sherman Act precluding an indirect purchaser's standing to sue in antitrust actions from being applied to actions under the Cartwright Act.

Assembly Bill 3222 (Deddeh) History, 1 1977-78 Reg. Sess. The indirect purchaser amendment "in effect incorporates into the Cartwright Act the view of the dissenting opinion in *Illinois Brick* that indirect purchasers are persons 'injured' by illegal

overcharges passed on to them in the chain of distribution." *Union Carbide Corp. v. Superior Court, supra,* 36 Cal. 3d at 20, 201 Cal. Rptr. at 582-83.

The stated intent of the California legislature to in effect overrule *Illinois Brick* is proof positive that the objectives of the state and federal laws conflict. The California indirect purchaser amendment could not have been more deliberately crafted to "stand as an obstacle to the accomplishment of the full purposes and objectives" of the federal antitrust laws as construed in *Illinois Brick.*

Accordingly, it would seem apparent that the 1978 indirect purchaser amendment is preempted. However, in *Crown Oil, supra,* 177 Cal. App. 3d 604, 223 Cal. Rptr. 164, followed by the courts in the present case, the California Court of Appeal held that the indirect purchaser amendment to the Cartwright Act does not conflict with the federal antitrust laws as interpreted in *Illinois Brick,* and is not preempted. The court reasoned, rather startlingly, that "it is the *Illinois Brick* majority decision which frustrates Congress' purpose in creating the treble damages action." 177 Cal. App. 3d at 612, 223 Cal. Rptr. at 186.

In the instant action, the trial court rejected Carbide's summary judgment motion on the ground that *stare decisis* bound it to follow *Crown Oil. See* Appendix C. The California Supreme Court rejected the preemption argument here by allowing the trial court and Court of Appeal to adhere to *Crown Oil* and to proceed on the plaintiffs' indirect purchaser claims. *See* Appendices A and B.

C. The Dangers of Indirect Purchaser Actions Identified by This Court in *Illinois Brick* Are Equally Inherent in State Indirect Purchaser Actions

1. As in *Illinois Brick*, this California indirect purchaser action creates an impermissible risk of multiple liability

In *Illinois Brick* this Court placed primary reliance on its conclusion that permitting indirect purchasers to prosecute an action would result in an unacceptable risk of duplicative recovery:

> A one-sided application of *Hanover Shoe* substantially increases the possibility of inconsistent adjudications – and therefore of *unwarranted multiple liability for the defendant* – by *presuming* that one plaintiff (the direct purchaser) is entitled to full recovery while preventing the defendant from using that presumption against the other plaintiff; overlapping recoveries are certain to result from the two lawsuits unless the indirect purchaser is unable to establish any pass-on whatsoever. *[W]e are unwilling to 'open the door to duplicative recoveries' under § 4.*

431 U.S. at 730-31 (emphasis in original and added) (footnote and citation omitted). In decisions since *Illinois Brick*, the Court repeatedly and unequivocally has reaffirmed the federal policy against such duplicative antitrust recoveries. *See Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 111 n.6 (1986); *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 544 (1983); *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 474-75 (1982); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 342 (1979).

Addressing the argument that various procedural mechanisms might reduce the risk of multiple liability, the *Illinois Brick* Court stated:

> [P]roponents of this approach ultimately fall back on the argument that it is better for the defendant to pay sixfold or more damages than for an injured party to go uncompensated . . . ("a little slopover on the shoulders of the wrongdoers . . . is acceptable"). *We do not find this risk acceptable.*

431 U.S. at 731 n.11 (emphasis added) (citations omitted). It is not just the actual occurrence of duplicative recovery, but the *risk* of such recovery, that federal law proscribes. *Id.* at 730-31.

This Court's interpretation of congressional policy in *Illinois Brick* simply cannot be squared with the decision of the California courts permitting the present action to go forward. If it is unacceptable for interstate defendants to be subject to multiple liability imposed in a single federal court for a single overcharge, it is not more acceptable if the second, third, or fourth recovery of treble the same overcharges is exacted by a state court.[15] Here, since Carbide has already paid the direct purchasers pursuant to the federal action, the maintenance of this indirect purchaser action plainly creates the risk, condemned in *Illinois Brick*, of multiple liability. Indeed, the risk of multiple liability is substantially *more* severe where, as here, the direct purchaser action is brought in federal court and the indirect

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[15] Multiple recoveries may be exacted by purchasers at various levels within the chain of distribution. Thus, purchasers at three or even four different market levels all may institute separate actions to recover treble the same overcharges.

purchaser action in state court.[16] In these circumstances, there is no forum before which the defendant can have adjudicated the conflicting claims of the direct and indirect purchasers, and hence avoid multiple liability. As noted above, Carbide asked the California courts to require joinder of the direct purchasers in this action; the California Supreme Court held that joinder was not required. *Union Carbide v. Superior Court, supra,* 36 Cal. 3d 15, 201 Cal. Rptr. 580. In this case, then, there are no "procedural mechanisms" to reduce or avoid the risk of multiple liability.

The California courts have articulated three purported rationalizations for tolerating the risk of multiple liability that arises as the result of a state court indirect purchaser action. None survives scrutiny, and none can be squared with *Illinois Brick.* First, the *Crown Oil* decision, followed by the California courts in the instant case, suggests that preemption does not result merely because both federal and state statutes impose penalties for the same wrong. 177 Cal. App. 3d at 611, 223 Cal. Rptr. at 167-68 (relying on *Silkwood v. Kerr-McGee Corp.,* 464 U.S. 238 (1984). This misses the point: while the mere existence of both state and federal penalties does not automatically result in preemption, preemption *does* necessarily result "where, as here, an express federal policy condemns multiple liability for antitrust defendants." *Cement, supra,* 817 F.2d at 1446.[17]

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16 Even the dissent in *Illinois Brick* recognized that a subsequent indirect purchaser suit risks impermissible multiple recovery. 431 U.S. at 763-64.

17 The law is clear that an unconstitutional intrusion upon the federal sphere by state laws may arise when a state enforcement scheme is in conflict with the federal policy as to remedies. *See, e.g., Sola Electric Co. v. Jefferson Electric Co.,* 317 U.S. 173 (1942) (state laws affecting equitable remedies must yield when federal remedial objectives are affected). *See also Garner v. Teamsters, Chauffeurs and Helpers Local Union,* 346 U.S. 485, 498-99 (1953) ("when two separate remedies are brought to

The California courts also have suggested that there is no risk of multiple liability where the direct purchaser action has been settled, since settlement is not tantamount to "liability." *See, e.g., Crown Oil, supra,* 177 Cal. App. 3d at 613, 223 Cal. Rptr. at 169. This thin exercise in semantics is unpersuasive on its face: a defendant who already has paid a multi-million dollar antitrust settlement clearly faces a risk of duplicative recovery from another multi-million dollar judgment or settlement. Moreover, this reasoning does not distinguish *Illinois Brick,* which also was an indirect purchaser action prosecuted after the direct purchaser action had been settled. In *Illinois Brick,* this Court *expressly recognized* that in most cases duplicative recovery will result from a settlement of the direct purchasers' claims followed by attempted prosecution of the indirect purchasers' claims. 431 U.S. at 731 n.11.

Finally, the California courts have suggested that the policy articulated in *Illinois Brick* against duplicative liability was not an interpretation of congressional intent or federal policy, but was merely "judicially economic." *See, e.g., Crown Oil, supra,* 177 Cal. App. 3d at 612, 223 Cal. Rptr. at 169. This is nonsense. The *Illinois Brick* Court's refusal to countenance the risk of multiple liability was premised on the Court's decision in *Hawaii v. Standard Oil Co.,* 405 U.S. 251 (1972), which in turn was based explicitly on an assessment of congressional intent in establishing federal antitrust damage remedies. 405 U.S. at 262-66. That *Illinois Brick* was an interpretation of Congress' intent is confirmed in two subsequent decisions of this Court, *Associated General Contractors, Inc. v. Carpenters, supra,* 459 U.S. at 543-44 and *Blue Shield of Virginia v.*

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bear on the same activity, a conflict is imminent" and preemption is required).

McCready, supra, 457 U.S. at 473-75. As Justice Marshall explained in his dissent in *Associated General Contractors:*

> Significantly, the risk of duplicative recovery that the Court relied on in both *Illinois Brick* and *Hawaii v. Standard Oil Co.* is not simply a judicially invented reason for restricting the broad scope of § 4. Permitting two recoveries based on the very same injuries would be contrary to the basic statutory scheme governing damages actions, for the result would be to subject antitrust defendants to sextuple-damages awards rather than the treble-damages awards that Congress contemplated.

459 U.S. at 550 n.7 (Marshall, J., dissenting) (emphasis added). It could not be more clear that *Illinois Brick* articulates a congressional policy against imposition of duplicative liability on antitrust defendants. The notion that this policy is not offended so long as the second or third imposition of multi-million dollar liability occurs under the aegis of a different sovereign is absurd, and should not long detain this Court. California's indirect purchaser antitrust statute is preempted.

2. As in *Illinois Brick*, this California indirect purchaser action impermissibly complicates federal antitrust enforcement

In *Illinois Brick*, the Court also held that permitting indirect purchasers to recover would impair efficient antitrust enforcement by unduly complicating litigation:

> Permitting the use of pass-on theories under § 4 essentially would transform treble-damages actions into massive efforts to apportion the recovery among all potential plaintiffs that could

> have absorbed part of the overcharge – from direct purchasers to middlemen to ultimate consumers. However appealing this attempt to allocate the overcharge might seem in theory, it would add whole new dimensions of complexity to treble-damages suits and seriously undermine their effectiveness.

431 U.S. at 737-38. *Accord Associated General Contractors v. California State Council of Carpenters, supra,* 459 U.S. at 544.

This policy is contravened equally whether the indirect purchaser action is brought under federal or state law. As the *ARC America* case illustrates, under modern joinder rules pendent state indirect purchaser claims often will be joined with federal direct purchaser claims in a single federal action.

Moreover, the present case clearly demonstrates that even where state indirect purchaser claims are brought in a state forum separately from the claims of direct purchasers, equally complex determinations are required and efficient antitrust enforcement is equally impaired. Where the direct purchaser claims are resolved first in a federal forum, the state forum hearing the indirect purchaser claims is confronted with a series of complex and intractable problems. First, there must be a determination whether there was an overcharge by the defendants and, if so, in what amount. If the state and federal finders of fact differ as to either the existence or amount of the overcharge, the state court must decide how to reconcile that conflict. The finder of fact then must determine what portion of any overcharge was passed on to the indirect purchasers, a determination that this Court in *Hanover Shoe* declined to permit because of its extreme complexity. There is no reason to believe – and considerable reason to doubt – that the California courts are any better equipped fairly to make such a calculation.

Further, if the direct purchasers' claims have not been finally resolved, the court also may be required to decide a motion by either party to bring the direct purchasers into the state action.[18] Such motions raise thorny issues of conflicting jurisdiction between the state court and the federal court with jurisdiction of the direct purchaser claims, and encourage potentially conflicting state and federal judgments. Moreover, to avoid duplicative recoveries, a state court would have to disallow some portion of the direct purchasers' recovery, in clear contravention of federal law.

In the instant case, where the federal action already has been settled, the state court must determine to what extent the settlement fairly represented the full amount of an overcharge trebled, discounted by the risks and costs of litigation. If the federal settlement is treated merely at its face value, then a defendant like Carbide has gained nothing by settling except the "right" to pay at least the balance of the overcharge (trebled) to the state court plaintiffs.

Few direct purchaser cases would settle under such a rule, and the resulting impairment of federal antitrust enforcement is obvious. The vast majority of antitrust cases settle; trial in such cases invariably is lengthy and extraordinarily complex. A significant reduction in the number of settlements would seriously undercut effective antitrust enforcement. Increasingly stale direct purchaser claims would languish for years awaiting trial, and direct purchasers would become ever more reluctant to bring such actions in view of the remoteness of recovery.

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[18] The California courts have thus far repelled such attempts in this case. *See Union Carbide Corp. v. Superior Court, supra*, 36 Cal. 3d 15, 201 Cal. Rptr. 580.

In short, the "new dimensions of complexity" eschewed by the Court in *Illinois Brick* are dwarfed by the jurisdictional and procedural labyrinths to be navigated in state indirect purchaser cases. If defendants are faced with such uncertainty, direct purchasers will find it that much harder to settle or adjudicate their claims.

3. As in *Illinois Brick*, this California indirect purchaser action reduces the incentives of direct purchasers to sue

The Court concluded in *Illinois Brick* that the goal of fully compensating each victim of price fixing was subordinate to the central enforcement goal of the Clayton Act:

> [O]n balance, and until there are clear directions from Congress to the contrary, we conclude that the legislative purpose in creating a group of "private attorneys general" to enforce the antitrust laws under § 4 . . . is better served by holding direct purchasers to be injured to the full extent of the overcharge paid by them than by attempting to apportion the overcharge among all that may have absorbed a part of it.

Id. at 746. The ability of indirect purchasers to recover any part of the overcharge diminishes the potential recovery of the direct purchasers, and hence their incentive to sue. This, too, impairs enforcement of the antitrust laws. *Id.* at 745.

Direct purchaser remedies and incentives are no less impaired because indirect purchaser claims are brought under state law. State law indirect purchaser claims can directly limit the recoveries of direct purchasers, since to the extent that such claims are brought or anticipated, a defendant may reduce any

offer to compromise with direct purchasers. *See Cement, supra,* 817 F.2d at 1446.

If the law becomes clear that duplicative state law recoveries by indirect purchasers are permissible, only a foolish defendant or one who is unrepresented by counsel will agree to pay direct purchasers the full amount the defendant is prepared to pay in settlement. Moreover, the possibility or pendency of state indirect purchaser litigation almost certainly will delay and impede federal direct purchaser suits, as defendants rush to defend themselves against duplicative liability through stays, interpleader, and motions for joinder or consolidation. *See, e.g., Illinois Brick, supra,* 431 U.S. at 761-63 (Brennan, J., dissenting). As held in *Illinois Brick,* it is precisely this effect that Congress intended to avoid.

Indeed, state law indirect purchaser actions present what might be termed the *Illinois Brick* dilemma. On the one hand, a defendant may reduce the amount it is prepared to offer in settlement to direct purchasers if it anticipates a later round of rummaging in its coffers by state indirect purchaser claimants. This result directly contravenes the federal policy against reducing the enforcement incentives of direct purchasers. On the other hand, a defendant who settled the federal case for the full amount, perhaps before the indirect purchaser statute was enacted or in the belief that state indirect purchaser claims are preempted, will be subjected to multiple liability, a result that also contravenes federal law. Either of these results violates congressional policy as articulated in *Illinois Brick,* and one or the other of these two results is certain to occur; there is no third possibility. Contrary to the vague invocation of "procedural mechanisms" by those who favor indirect purchaser claims, the present case and *ARC America* together illustrate that there is only one way to untie this Gordian knot: for this Court to rule that state law indirect purchaser actions are preempted by federal law.

II. BY EXPOSING ANTITRUST DEFENDANTS TO THE RISK OF DUPLICATIVE RECOVERIES, STATE INDIRECT PURCHASER ACTIONS VIOLATE DUE PROCESS

Duplicative recoveries do not offend only against federal statutory policy. This Court has held that exposing a defendant to the risk of multiple liability for a single civil wrong violates the Due Process Clause of the Fourteenth Amendment of the United States Constitution. *See Western Union Telegraph Co. v. Pennsylvania,* 368 U.S. 71, 76-77 (1961). While *Western Union* involved the exercise of a state's escheat power, courts and commentators have recognized that *any* exposure to multiple liability may constitute a denial of due process in violation of the federal Constitution. *See generally* 7 Wright, Miller & Kane, *Federal Practice & Procedure* § 1602 at 21-27 (1986) (discussing the interplay between the federal compulsory joinder rule (Rule 19 of the Federal Rules of Civil Procedure) and due process).[19]

Here, the potential for multiple liability is staggering: for a product with a many-tiered distribution scheme, a defendant may face six-fold, nine-fold, or even greater liability. That such liability is contrary to the most fundamental notions of due process seems almost too obvious to state.

Indeed, several courts have recognized the substantial likelihood of a due process violation if an indirect purchaser action is permitted to proceed in the absence of direct purchasers. In *Russo & Dubin v. Allied Maintenance Corp.,*

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[19] *See also Haas v. Jefferson National Bank,* 442 F.2d 394, 398 (5th Cir. 1971); *Prestenback v. Employers' Ins. Co.,* 47 F.R.D. 163, 167 (E.D. La 1969); *Davila Mendez v. Vatican Shrimp Co.,* 43 F.R.D. 294, 296 (S.D. Tex. 1966). *And see Provident Tradesmens Bank & Trust Co. v. Patterson,* 390 U.S. 102, 123 (1968).

407 N.Y.S.2d 617 (1978), the court held that the New York analogue to the Cartwright Act did not permit an indirect purchaser action where duplicative recovery might be the result, since

> [a]ny other result would create serious conflict between enforcement of state and federal antitrust laws *which would subject defendants to multiple liability in derogation of due process.*

Id. at 620 (emphasis added). Similarly, in *In re Wiring Device Antitrust Litigation,* 498 F. Supp. 79, 87-88 (E.D.N.Y. 1980), the court noted that only its conclusion that the South Carolina statute did not permit an indirect purchaser action permitted it to avoid the "serious question" of violation of the Due Process Clause.

In short, maintenance of the present action will result not only in violation of statutory antitrust policy but in violation of the Due Process Clause as well.

CONCLUSION

The conflict between federal law and state indirect purchaser antitrust statutes is genuine, it is irreconcilable, and it can be resolved only by this Court. It results in unseemly and unacceptable tensions in the fabric of federalism, where a state legislature can defy the intent of Congress and the victim is the defendant subjected to sextuple or greater damages at the hands of the two disputing sovereigns. It necessarily disrupts antitrust enforcement, not only in the three respects defined in *Illinois Brick,* but because of the pervasive uncertainty it creates as to whether state indirect purchaser actions ultimately will be allowed. This uncertainty greatly complicates the plaintiff's decision about whether and against whom to proceed, as well as

the defendant's decision whether to enter into a settlement with direct or indirect purchasers.

The present case, together with *ARC America*, places before the Court all dimensions of the problem, and offers the Court an opportunity fully and finally to resolve it. Petitioner accordingly urges the Court to grant its Petition for a Writ of Certiorari.

Dated: February 6, 1989

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MORRISON & FOERSTER
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APPENDIX A

ORDER DENYING REVIEW

AFTER JUDGMENT BY THE COURT OF APPEAL
1st District, Division 3, No A042423
S007495

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

UNION CARBIDE CORP., *Petitioner,*

v.

SUPERIOR COURT OF THE COUNTY OF SAN FRANCISCO, *Respondent;*

VILLMAR DENTAL LABS, INC., *et al.*,
Real Parties in Interest.

Petition for review DENIED.

LUCAS
Chief Justice

APPENDIX B

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOR THE FIRST APPELLATE DISTRICT
DIVISION THREE

UNION CARBIDE CORPORATION, *Petitioner,*

v.

THE SUPERIOR COURT FOR THE COUNTY OF SAN FRANCISCO, *Respondent;*

VILLMAR DENTAL LABS, INC., *et al.*,
Real Party in Interest.

A042423

Super. Ct. # 776005

BY THE COURT:

Petition for writ of mandate and/or prohibition is denied. (White, P.J., Barry-Deal, J. and Merrill, J. participated in the decision).

Dated September 30, 1988

/s/ P.J. White

APPENDIX C

CALIFORNIA SUPERIOR COURT
CITY AND COUNTY OF SAN FRANCISCO
DEPARTMENT NUMBER EIGHTEEN

VILLMAR DENTAL STUDIO, INC., *et al.*,
Plaintiffs,

v.

UNION CARBIDE CORPORATION, *et al.*,
Defendants.

NO. 776005

ORDER DENYING DEFENDANT UNION CARBIDE'S MOTION FOR SUMMARY JUDGMENT

The above entitled matter came on for hearing on defendant *Union Carbide's* Motion for Summary Judgment on February 19, 1988 and the matter briefed, argued, and submitted.

The court finds that *stare decisis* governs the rulings of this court. *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal. 2d 450, 455. The court therefore finds that the principals [sic] of *Crown Oil Corporation v. Superior Court* (1986) 177 Cal. App. 3d 605 are controlling and therefore the 1978 amendment to the Cartwright Act (B.&P. section 16750(a)) is not in conflict with the federal law.

The court orders that the Motion for Summary Judgment be and the same is hereby denied. Counsel for plaintiff is ordered to prepare a formal order and give notice to all parties.

Dated: April 1, 1988

/s/ DANIEL M. HANLON
Judge of the Superior Court

(2)

No. 88-1304

Supreme Court, U.S.
FILED
MAR 7 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1988

UNION CARBIDE CORPORATION,

Petitioner,

v.

SUPERIOR COURT FOR THE STATE OF CALIFORNIA
FOR THE CITY AND COUNTY OF SAN FRANCISCO,

Respondent,

VILLMAR DENTAL LABS, INC., A CALIFORNIA CORPORATION,
NOWELL'S, INC., A CALIFORNIA CORPORATION, AND
BEAPER, INC., A CALIFORNIA CORPORATION,

Real Parties In Interest.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL

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8 pp

QUESTIONS PRESENTED

1. Is this Petition taken from the denial of a summary judgment motion ripe for review by this Court?

2. Assuming, *arguendo*, that this Petition is ripe for review, does California's amendment to its antitrust laws, Business Professions Code, Section 16750(a), permitting indirect-purchaser damage actions for state-law violations, so conflict with the purposes of the federal antitrust laws that it must be pre-empted by this Court's indirect-purchaser decision in *Illinois Brick Company v. Illinois*, 431 U.S. 720 (1977)?

LIST OF PARTIES AND RULE 28.1 LIST

The parties to the proceedings below are the Petitioner, Union Carbide Corporation, the Respondent, Superior Court of the State of California for the City and County of San Francisco, and Real Parties in Interest, Villmar Dental Labs, Inc., Nowell's, Inc., and Beaper, Inc.

None of the Real Parties in Interest is owned by any parent corporation; none owns any subsidiaries or has any affiliates.

Petitioner Union Carbide Corporation's Rule 28.1 list of parent companies, subsidiaries and affiliates has already been set forth in the Petition for Writ of Certiorari.

Real Parties do not know of any other interested parties.

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I

INTRODUCTION

This Petition reaches this Court from the denial of a motion for summary judgment filed by petitioner, Union Carbide Corporation ("Union Carbide"), the defendant below, in the Superior Court of the State of California for the City and County of San Francisco. The California Court of Appeal denied Union Carbide's Petition for Writ of Mandate and the California Supreme Court denied a hearing. Petitioner then sought review by way of certiorari in this Court.

No discovery has been taken of Union Carbide in this action. The class certification motion has as yet not been ruled upon. This case is in the pleading stages only. Thus, there is no factual record which this Court can review to determine whether Union Carbide's predictions about the outcome of this case will, in fact, occur.

II

THIS CASE IS NOT RIPE FOR REVIEW

Because this case is in its early pleading stages, and because there is no record for this Court to review regarding any of the factual matters asserted by Union

Carbide, Real Parties respectfully suggest that this Court should deny Union Carbide's Petition for Writ of Certiorari at this time. Therefore, until there is a complete record developed in the trial court any predictions Union Carbide may make about multiple liability is simply speculative at this stage of these proceedings. As this Court knows, there was no verdict against Union Carbide in the federal direct-purchaser action. Neither has there been any verdict against Union Carbide in this proceeding in the state court. Union Carbide simply settled the federal case, denying all antitrust liability. There has been no factual showing that Union Carbide will be subjected to liability of any kind in this state-court action, much less multiple liability. Thus, there is no showing that the pre-emption doctrine or the due process clause are implicated in these proceedings.

III

NO REVIEW OF THE PRE-EMPTION ISSUES IS APPROPRIATE AT THIS TIME

Review of the present case is inappropriate because this Court heard oral argument in *State of California v. ARC America Corporation*, Docket

No. 87-1862, 109 S.Ct. 51 (1988), on February 27, 1989. That case which raised, in part, similar pre-emption and due process issues may resolve similar issues in this case. Obviously, if those questions are reached, this Court's decision in *ARC America* will be controlling on all state courts regarding the pre-emption and due process issues. Therefore, it is unnecessary for this Court to docket this case on those similar issues at this time.[1]

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1. Should this Court not reach the issue of whether a state-court proceeding under a state's antitrust laws is pre-empted by *Illinois Brick's* ban on indirect-purchaser damage actions for Sherman Act violations in *ARC America*, then this Court may wish to consider taking that issue in this case.

IV

CONCLUSION

For the above-stated reasons Real Parties respectfully suggest that this Court should deny Union Carbide's Petition for a Writ of Certiorari at this time.

Dated: March 3, 1989

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No. 88-1304

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1988

UNION CARBIDE CORPORATION,
Petitioner,
v.
SUPERIOR COURT FOR THE STATE OF CALIFORNIA
FOR THE CITY AND COUNTY OF SAN FRANCISCO,
Respondent,

VILLMAR DENTAL LABS, INC., A CALIFORNIA CORPORATION,
NOWELL'S, INC., A CALIFORNIA CORPORATION, AND
BEAPER, INC., A CALIFORNIA CORPORATION,
Real Parties in Interest.

ON PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL

PETITIONER'S REPLY MEMORANDUM

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Petitioner Union Carbide Corporation ("Carbide") submits this reply memorandum in response to the brief of Real Parties in Interest ("Real Parties") filed in opposition to Carbide's Petition for A Writ of Certiorari ("Petition").[1]

In its Petition Carbide raises two issues: whether California's indirect purchaser statute is preempted by the federal antitrust laws, and whether it violates the Due Process Clause of the Fourteenth Amendment. Real Parties neither address Carbide's arguments nor challenge the Court's jurisdiction to resolve these questions now.[2] They simply suggest that there is no "factual record" for this Court to review and that the preemption and due process issues are not "ripe" for decision. These contentions seriously mischaracterize the record in this case and are without merit.

I. REAL PARTIES' CONTENTION REGARDING THE DESIRABILITY OF ADDITIONAL FACTUAL DEVELOPMENT IS SPECIOUS

Real Parties assert that the Court should not grant Carbide's petition because Real Parties have taken no discovery and the case "is in its early pleading stages."[3] Brief in Opposition to Petition for Writ of Certiorari ("Opposition Brief") at 1. This argument is contradicted by the record.

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[1]Carbide's Rule 28.1 List, Petition at ii, remains unchanged.

[2]Indeed, Real Parties suggest that the Court should grant Carbide's Petition if it does not fully resolve the preemption issue in the pending appeal of *State of California v. ARC America Corp.*, No. 87-1862. *See* Opposition Brief at 3 n.1.

[3]In fact, this case has been pending for over eight years (since January of 1981) while the parties have sought to resolve the same legal issues presented by Carbide's Petition.

Real Parties *stipulated* to stay the action – including all discovery – in the trial court pending disposition of Carbide's summary judgment motion on the preemption and due process issues. Real Parties sought no discovery, either before Carbide's motion was filed or after. Real Parties presented no evidence in opposition to Carbide's motion, disputed none of the evidence submitted by Carbide, and never suggested to the trial court that any additional facts might exist that would bear on the merits of these issues. Rather, Real Parties recognized that, as remains true, the disputed issues are purely ones of law.

Carbide introduced into evidence numerous Statements of Undisputed Material Fact and supporting declarations and exhibits. This evidence established that the indirect purchaser plaintiffs sought recovery for the same alleged overcharges on the same units of industrial gas for which Carbide had already paid direct purchasers in the federal action. Carbide thereby established that any recovery by indirect purchasers in the present action – either by judgment or by settlement – would constitute a duplicative recovery. *See* Petition at 7-11. Real Parties did not object to or dispute a single element of the evidence on which Carbide's motion was based. They did not ask for additional discovery in order to respond. They did not offer any contrary evidence. Indeed, Real Parties admitted the ultimate fact necessary to prove that Carbide faces the risk of duplicative recovery: that they "seek to recover the same alleged overcharges which were the subject of the federal action and which are the subject of the settlement in the federal action."[4] Given this admission, no additional evidence is necessary to support a finding of preemption.

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[4]Record before the California Court of Appeal, Statement of Undisputed Fact No. 12 (Exhibit 4).

Consequently, Real Parties contested Carbide's motion on purely legal, not factual grounds. The trial court denied the motion solely as a matter of stare decisis. No factual question was involved. For Real Parties to now suggest that additional discovery is necessary to determine the preemption and due process issues not only is wrong, but is a fundamental misrepresentation of the history and posture of this case.

II. REAL PARTIES' CONTENTION THAT THE RISK OF DUPLICATIVE LIABILITY IS "SPECULATIVE" IS INCORRECT BOTH AS A MATTER OF FACT AND OF LAW

Real Parties further argue that the threat of duplicative liability is "speculative," contending that there has been "no factual showing that Union Carbide will be subjected to liability of any kind in this state-court action, much less multiple liability." *See* Opposition Brief at 2. Yet the threat of multiple recovery in this case is precisely the same as that in *Illionis Brick Co. v. Illinois,* 431 U.S. 720 (1977) ("*Illinois Brick*"), where indirect purchasers were also seeking recovery after the direct purchasers had settled, and the defendants challenged their right to do so by a motion for summary judgment. In *Illinois Brick* the Court construed congressional intent and found that the federal antitrust laws proscribe not only duplicative liability but the *risk* of duplicative liability. 431 U.S. at 730-31. The Court has repeatedly affirmed this federal policy. *See Cargill, Inc. v. Monfort of Colorado, Inc.,* 479 U.S. 104, 111 n.6 (1986); *Associated General Contractors of California, Inc. v. California State Council of Carpenters,* 459 U.S. 519, 544 (1983); *Blue Shield of Virginia v. McCready,* 457 U.S. 465, 474-75 (1982). *See* Petition at 16-17. Moreover, there is no dispute – Real Parties have conceded – that any recovery by the direct purchasers will necessarily be duplicative. In asking the Court to await the actual imposition of a duplicative recovery on

Carbide before addressing the preemption and due process issues, Real Parties ignore the facts and the law of *Illinois Brick*.

III. THE PETITION SHOULD BE GRANTED

Real Parties *concede* that it would be appropriate for the Court to grant Carbide's Petition if the Court does not fully resolve the preemption issue in the pending *ARC America* appeal. *See* Opposition Brief at 3 n.1. As Carbide noted in its Petition at 7-9, however, the instant case presents the preemption issue in a different and clearer posture than does *ARC America*. In contrast to *ARC America*, no court here has jurisdiction over both direct and indirect purchasers; any recovery by the indirect purchasers necessarily will be duplicative of the direct purchasers' prior recovery in the federal action. Accordingly, this case presents the Court with an opportunity to fully address all aspects of the preemption question. Thus, Petitioner respectfully requests the Court to consider this case in conjunction with the pending appeal in *ARC America*.

Dated: March 10, 1989

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